



NEW YORK STATE
OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES
OFFICE OF COUNSEL

Update on Child Abuse Reporting and Investigations November, 2008

Governor Paterson recently signed a new law which strengthens the provisions of law related to protecting children in residential care from abuse and neglect (Chapter 323 of the Laws of 2008). Last year, the Governor signed a law requiring direct reporting of child abuse by mandated reporters to the Statewide Central Register (Chapter 193 of the Laws of 2007). Together these new laws enhance our efforts to protect children from harm and to provide accountability for reporting and investigating child abuse in residential care.

This article describes the important changes resulting from the new laws, as well as the general reporting and investigation requirements for child abuse under the Social Services Law and Mental Hygiene Law. Child abuse reports and investigations are done in addition to the incident reporting and investigation requirements of OMRDD regulations, 14 NYCRR Part 624. For purposes of child abuse reporting and investigations under Social Services Law article 6, a child is someone under age 18.

1. Investigations of Child Abuse and Neglect

Child abuse and neglect (or "maltreatment") that occurs in a child's home and is caused by the child's parent, guardian or other custodian is reported to the New York State Statewide Central Register. Local County Child Protective Services (or ACS in NYC) will investigate these cases. Social Services Law Section 412 describes what acts or omissions constitute "familial" child abuse or neglect.

Child abuse or neglect can also occur while a child is in residential care, including those residential facilities certified or operated by OMRDD (except family care homes). In these cases, the Commission on Quality of Care and Advocacy for Persons with Disabilities (CQCAPD) is authorized by both the Social Services Law and the Mental Hygiene Law to investigate reports. New section 412-a of the Social Services Law describes what acts or omissions constitute child abuse or neglect in "residential care."

Finally, child abuse or neglect can also occur in a family care home. In these cases, the standards of child abuse and neglect under Social Services Law Section 412 are used, and OMRDD (the appropriate DDSO) is authorized by section 424-b of the Social Services Law to investigate the report.

The definitions in Social Services Law Section 412 are not exactly the same as the definitions in new Social Services Law Section 412-a. Some acts that may not be considered "child abuse" if committed by a family member (such as the

withholding of nutrition or hydration as punishment) would constitute “child abuse” if committed in a residential facility. However, in all of these cases, if the investigation concludes that child abuse or neglect is founded, (or “indicated”), the person found to have committed the act will be listed on the Statewide Central Register of Child Abuse and Maltreatment (SCR). Subjects listed on the SCR will likely face employment and other consequences.

2. Mandated Reporters

Social Services Law Section 413 lists numerous professionals and officials who are “mandated reporters.” Mandated reporters are required to report to the SCR when, in their professional or official capacities, they have reasonable cause to suspect child abuse or maltreatment. Mandated reporters can be held liable by both the civil and criminal legal systems for intentionally failing to make a report.

It is important to note that **all** employees and volunteers of residential care facilities, including all staff of OMRDD operated and certified residential facilities that serve children, are mandated reporters.

3. Additional reporting of child abuse or neglect

All OMRDD providers are required to report incidents in accordance with 14 NYCRR Part 624. Part 624 defines abuse more broadly than the definitions of “child abuse or neglect” in the Social Services Law. All cases of abuse or neglect, as they are more broadly defined in OMRDD regulations or policy, must be reported in accordance with these OMRDD standards, even when a separate child abuse report is made to the SCR under the Social Services Law.

4. Chapter 193 of the Laws of 2007 – Direct Reporting

Prior to October 1, 2007, a mandated reporter could fulfill his or her responsibility to report suspected child abuse by immediately notifying the person in charge of the facility where the reporter worked, or the designated agent for the facility. As a result, many mandated reporters could discharge their responsibilities by notifying the person “in charge.” It then became the responsibility of that person to make the report to the SCR.

Chapter 193 amended this section of law. Mandated reporters who must report child abuse in their capacity as a staff member of certain facilities, institutions, programs, or schools, including all OMRDD facilities and programs, must now *personally* make the report to the State Central Register. Following the report, the mandated reporter must immediately notify the person in charge of the facility, or the designated agent, that the report has been made.

The mandated reporter must provide the Statewide Register (to the best of his or her knowledge) the name, title, and contact information for each staff person of the facility believed to have direct knowledge regarding the allegations in the report. Once a mandated reporter has made the report, other mandated reporters with direct knowledge of the incident, who know that the report was made, are not required to make a separate, additional report. Following the first report, the person in charge of the facility is responsible for subsequent activities

related to the investigation (such as providing follow-up information to the investigators and completing required forms).

5. Chapter 323 of the Laws of 2008

A number of changes to the Social Services Law and the Mental Hygiene Law were made as a result of Chapter 323. *These changes become effective January 17, 2009.* For OMRDD providers, the most significant changes are amendments to the definitions regarding abuse and neglect of children who reside in a residential facility, including OMRDD operated or certified facilities such as developmental centers, ICFs/MR, or IRAs.

New definitions of child abuse and neglect in residential care:

Prior to the amendments, a child would have to suffer serious harm or death, be put in substantial risk of same, or be the victim of a sex offense, before a finding of abuse or neglect could be made. While those provisions of law are preserved, the law has been expanded to provide additional protections to children in residential care.

The definitional changes represent a shift from focusing only on the degree of harm suffered by a child to certain actions, so egregious and inappropriate when committed by a staff person in a residential care setting, that they constitute abuse. These acts (all of which already constitute “abuse” as defined in 14 NYCRR Part 624) include:

- Throwing, shoving, kicking, burning, striking, choking, smothering, pinching, punching, shaking, cutting or biting a child;
- Displaying a weapon or other object that could reasonably be perceived by the child as a means for inflicting pain or injury;
- Using corporal punishment;
- Withholding nutrition or hydration as punishment; or
- Unlawfully administering any controlled substance or alcoholic beverage to a child.

A child is considered to be a “neglected child in residential care” if he or she experiences an impairment of his or her physical, mental, or emotional condition or is subjected to same because he or she has not received:

- adequate food, clothing, shelter, medical, dental, optometric, or surgical care;
- access to educational instruction; or
- proper supervision or guardianship.

A child could also be considered a “neglected child in residential care” if he or she is:

- inflicted with a physical, mental, or emotional injury, excluding a minor injury, by other than accidental means, or risk of same, if the injury or risk was reasonably foreseeable; or
- inflicted with a physical, mental, or emotional injury, excluding a minor injury, by other than accidental means, or risk of same, if the injury or risk was the result of the failure to implement an agreed-upon plan of correction; or

- subjected to the intentional administration or any prescription or non-prescription drug other than in substantial compliance with a lawful prescription.

Chapter 323 also contains new definitions of “physical injury or impairment,” which means “any confirmed harm, hurt, or damage resulting in a significant worsening or diminution of a child’s physical condition.” The law also defines “mental or emotional injury or impairment” to mean “a substantial diminution of a child’s psychological or intellectual functioning which is determined by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker, or licensed mental health counselor.”

Clarification of CQCAPD role:

The new law also clarifies the role of the Commission on Quality of Care and Advocacy for Persons with Disabilities which investigates reports of child abuse in OMRDD residential facilities. Within 60 days of the report, CQCAPD must determine whether:

- to recommend to the Office of Children and Family Services that a report be “indicated” or “unfounded;”
- it appears that a child was abused by his parent or other person legally responsible and file a separate report to the SCR;
- it appears likely that a crime may have been committed against a child and report to law enforcement;
- it appears that there has been a violation of applicable statutory, regulatory, or other requirements regarding the child’s care and treatment and if so, the provider and OMRDD must be notified and corrective actions taken.

Other changes:

In addition, the standard of proof needed to sustain an indicated report of abuse or neglect of a child in residential care at an administrative review is changed to reflect the fair preponderance of the evidence, rather than credible evidence (the standard for indication) to conform with the standard required by court decisions.

Finally, the new law expands the list of residential facilities subject to the provisions of Social Services Law Section 412-a to include certain programs of the Office of Alcoholism and Substance Abuse Services. Also included in this list are co-located facilities separately licensed by the Office of Children and Family Services and the Office of Mental Health.

More information concerning child abuse and maltreatment also is available on other agency websites: Commission on Quality Care and Advocacy for Persons with Disabilities -- www.cqcapd.state.ny.us; Office of Children and Family Services -- www.ocfs.state.ny.us; Office of Mental Health -- www.omh.state.ny.us; State Education Department -- www.nysed.gov; Office of Alcoholism and Substance Abuse – www.oasas.state.ny.us.